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No. 07-384

In the Supreme Court of the United States

DANIEL MEASUREMENT SERVICES, INC.,

Petitioner,

v.

EAGLE RESEARCH CORP.,

Respondent.

On Petition for a Writ of Certiorari to the Circuit Court of Putnam County, West Virginia

MOTION OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the Product Liability Advisory Council, Inc. (PLAC) moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. Counsel for petitioners has consented to the filing of this brief, but counsel for respondents has withheld consent.

PLAC is a non-profit corporation with 124 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers of a wide array of products, including automobiles, aircraft, electronics, chemicals, pesticides, pharmaceuticals, and medical devices. A list of PLAC's current corporate membership is included in an appendix to the accompanying brief.

PLAC's primary purpose is to file *amicus curiae* briefs in cases raising issues that affect the development of product liability law and have potential impact on PLAC's members. PLAC has submitted hundreds of *amicus* briefs in the federal and state appellate courts, including in many of this Court's cases addressing the review of jury damages awards. See, *e.g.*, *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003); *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415 (1996); *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559 (1996); *Honda Motor Co., Ltd.* v. *Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443 (1993). Because many of PLAC's members become defendants in lawsuits in which there is a risk that a jury will award damages that are not supported by the record, they have a vital interest in ensuring that there is meaningful and appropriate judicial review of compensatory damages awards and in the proper resolution of this case.

PLAC's motion for leave to file the accompanying brief as *amicus curiae* should be granted.

Respectfully submitted.

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BRIEF FOR THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

STATEMENT

This case arises out of a West Virginia jury's multimillion-dollar award of damages in a contract case. Respondent Eagle Research Corporation (Eagle Research) alleged that petitioner Daniel Measurement Services (Daniel Measurement) breached a confidentiality agreement executed by the two companies that prohibited the sharing of each other's technology.[2] The only proper damages that could be awarded on Eagle Research's breach-of-confidentiality claim were for the "reasonable" and "ascertainable" losses suffered by Eagle Research that were "proximately caused by the breach." Pet. App. 44a.

The case was tried in the Circuit Court of Putnam County, West Virginia. Prior to trial, the trial judge declined to resolve any of the claims on the ground that "this is West Virginia" and "we don't give summary judgment." Pet. App. 47a. At the trial itself, there was no evidence presented that Eagle Research suffered *any* losses proximately caused by a breach of the confidentiality agreement. Nonetheless, the jury awarded damages of *$10.5 million* on that claim. *Id.* at 3a-4a. The only possible basis for the jury's substantial award was that it

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[1] Pursuant to S. Ct. Rule 37.6, PLAC states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] Respondent also asserted a claim based on breach of an oral contract, but the jury's award of damages on that claim is not at issue here.

represented a disgorgement of petitioner's profits. *Id.* at 53a-56a. The trial court, however, had rejected disgorgement as a proper measure of damages, and the jury was not instructed that it could award damages on this basis. *Id.* at 12a, 44a.

After the verdict, Daniel Measurement requested a new trial and other relief on the ground that there was no evidence whatsoever supporting the jury's $10.5 million damages award. In response to that motion, Eagle Research failed to point to any evidence in the record of losses it had suffered as a proximate cause of the breach of the confidentiality agreement and instead merely observed, "Who knows what [the jurors] were thinking." Pet. App. 8a. The trial court admitted that it was "concerned" about the $10.5 million award (*id.* at 12a), but nonetheless left it in place without making any findings or offering any rationale for that decision. *Id.* at 13a. The closest the district judge came was to speculate (as it turned out, erroneously) that Eagle Research might have challenged the jury instructions on the measure of damages, but "I cannot recall now" and "I can't wade through" the jury instructions "at this stage" and "so I'm going to leave that as it is." *Ibid.* Daniel Measurement then sought review of the trial court's denial of its motion for a new trial and other post-judgment relief in the West Virginia Supreme Court of Appeals, but appellate review is discretionary, not automatic, in West Virginia. Thus, although two Justices (one short of a majority) voted to hear the case, review was denied.

INTRODUCTION AND SUMMARY OF ARGUMENT

As this case comes to the Court, the West Virginia jury's compensatory damages award of $10.5 million is completely bereft of evidentiary support and yet has never been the subject of any meaningful review by the West Virginia judiciary, either at the trial or appellate levels. This complete abdication of judicial responsibility raises in an unusually stark form a fundamental issue concerning the meaning of the Fourteenth Amendment's guarantee of due process of law. Review is warranted to clarify the minimum requirements of due process

in the important and recurring setting of judicial review of excessive or unsupported jury awards of compensatory damages. Although this Court's recent decisions concerning judicial oversight of civil jury awards have all come in the area of punitive damages, the same safeguards are required with respect to compensatory damages. The Court should grant review to make that clear.

I. The parity of treatment of punitive and compensatory damages when it comes to the minimum procedural safeguards required by due process finds support not only in history, tradition, and precedent but also in common sense. "As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co., Ltd.* v. *Oberg*, 512 U.S. 415, 430 (1994). At common law, jury awards of all types of damages, whether they would now be categorized as "compensatory" or "punitive," were subject to the same post-verdict review. For centuries, English courts have reexamined damages awards for excessiveness without differentiating between compensatory and punitive damages. Reviewing that history in *Oberg*, this Court observed that "there is no suggestion that different standards of judicial review were applied for punitive and compensatory damages before the 20th century * * *." *Id.* at 422 n.2. This Court therefore held in *Oberg* that the Constitution requires post-verdict review of the size of a damages award. *Id.* at 432.

Especially in cases such as this where a jury awards a multimillion-dollar "compensatory" damages award that is utterly lacking in evidentiary support, the line between compensatory and punitive damages is blurred if not obliterated. Compensatory damages are designed to allow a plaintiff to recoup losses it has suffered as a consequence of a defendant's tortious or wrongful conduct. The jury's award here, however, did not compensate respondent. To the contrary, there was no evidence in the record that respondent had actually suffered any compensable loss as a consequence of petitioner's alleged breach of the confidentiality agreement. The only plausible

explanation for the large size of the jury's verdict, then, is that the jury elected to take profits that Daniel Measurement earned from its alleged breach and simply transfer them to Eagle Research. Although taking away Daniel Measurement's profits may *deter* it from future wrongdoing (or even punish it for the breach of contract), those are established functions of *punitive* rather than compensatory damages. See *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001); see also Bozyk, *Disgorging American Business: An Examination of Overbroad Remedies in Civil RICO Cases*, 59 RUTGERS L. REV. 129, 140 (2006) ("Disgorgement is inherently a punitive remedy since the remedy goes beyond deterring tortious behavior and compensating injured parties.").

II. The proceedings below clearly violated the Due Process Clause of the Fourteenth Amendment. The jury's baseless multimillion-dollar exaction should have been subjected to a "definite and meaningful constraint on discretion" as is required under this Court's punitive damages cases. *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 22 (1991). See also *Oberg*, *supra*; *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443 (1993). The procedures used by the West Virginia courts in this case, however, fell woefully short of what the Due Process Clause requires. There was no review of the jury's decision by a court that did not preside over the trial – as was standard at common law – nor did any court provide a reasoned explanation for its decision to let the jury award stand. Indeed, the proceedings here offered substantially less protection than the two sets of procedures this Court has found sufficient to withstand scrutiny under the Due Process Clause. This case presents an ideal opportunity for this Court to clarify the procedures that due process requires before a defendant may be deprived of property by a jury's compensatory damages verdict. The need for additional guidance on this subject is just as pressing today as was the need for elaboration of the constitutional principles governing punitive damages in 1989, when this Court entered that field by deciding *Browning-Ferris Industries* v. *Kelco*, 492 U.S. 257 (1989).

ARGUMENT

REVIEW IS WARRANTED TO DECIDE WHETHER THE MEAGER PROCEDURES EMPLOYED BY THE WEST VIRGINIA COURTS IN REVIEWING THE COMPENSATORY DAMAGES AWARD IN THIS CASE SATISFY DUE PROCESS

In recent years, this Court has developed and clarified the due process limits on the discretion of civil juries in a line of cases involving punitive damages. See, *e.g.*, *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 22 (1991); *Honda Motor Co., Ltd.* v. *Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443 (1993). Yet as many with everyday experience with our civil litigation system will attest, the problem of arbitrary, excessive and even irrational jury awards is no less severe in the area of damages labeled as compensatory. Further review would serve to clarify the minimum constitutional standards of judicial review and oversight that must be applied, under the Due Process Clause, to compensatory awards to ensure that they do not effectuate arbitrary deprivations of property.

I. The Due Process Clause Requires Equivalent Procedural Protections With Respect To The Judicial Review Of Punitive And Compensatory Damages Awards

A. Under this Court's due process decisions, "traditional practice provides a touchstone for constitutional analysis." *Oberg*, 512 U.S. at 430. Indeed, "[b]ecause the basic procedural protections of the common law have been regarded as so fundamental, very few cases have arisen in which a party has complained of their denial." *Ibid.* At common law, jury awards of all types of damages, whether they would now be categorized as "compensatory" or "punitive," were subject to the same post-verdict review. English courts for centuries have reexamined damages awards for excessiveness without ever "differentiat[ing] between compensatory and punitive damages." DeCamp, *Beyond* State Farm: *Due Process*

Constraints on Noneconomic Compensatory Damages, 27 HARV. J.L. & PUB. POL'Y 231, 235 (2003). As this Court concluded in *Oberg*, "there is no suggestion that different standards of judicial review were applied for punitive and compensatory damages before the 20th century * * *." 512 U.S. at 422 n.2. See also *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. at 437 n.11 (2001) (describing historical overlap between compensatory and punitive damages).

What is more, English courts more readily and easily reviewed economic damages awards, such as the award in this case, than non-economic or exemplary damages awards. In cases involving economic damages, "'there was no doubt of the power of the Court to exercise a proper discretion in setting aside verdicts for excessiveness of damages, in cases where the quantum of damage really suffered by the plaintiff could be apparent.'" DeCamp, *supra*, 27 HARV. J.L. & PUB. POL'Y at 238 (quoting *Wilford* v. *Berkley*, 1 Burr. 609, 97 Eng. Rep. 472 (C.P. 1758)). Where the "damages 'were of such a nature that the Court could properly judge the degree of injury, and could see manifestly that the jury had been outrageous in giving such damages as greatly exceeded the injury'" (*ibid.*), it was beyond dispute that the defendant was entitled to some level of judicial process and review to ensure that the jury's award was not arbitrary.

That common law afforded (at least) the same procedural protections in connection with the award of compensatory and punitive damages is not surprising. The risk, as this Court's punitive damages jurisprudence makes clear, is not only that a defendant will be improperly "punished," but more fundamentally that the defendant will be arbitrarily deprived of property (in the form of a damages award) without due process of the law. "This constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring). The same concern about

arbitrary deprivations of property applies to compensatory and punitive damages awards.

B. In theory, compensatory and punitive damages are designed to serve different purposes. Compensatory damages are plaintiff-focused and "intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *Cooper Indus.*, 532 U.S. at 432. See also 1 D. DOBBS, LAW OF REMEDIES § 3.1 at 281 (2d ed. 1993). Punitive damages, on the other hand, are defendant-focused, "operat[ing] as 'private fines' intended to punish the defendant and to deter future wrongdoing." *Cooper Indus.*, 532 U.S. at 432. See also *Gore*, 517 U.S. at 568 ("Punitive damages may properly be imposed to further a State's legitimate interest in punishing unlawful conduct and deterring its repetition); 1 D. DOBBS, *supra*, § 3.11(1), at 452.

In practice, however, damages that are labeled "compensatory" often fulfill goals more traditionally served by punitive damages. See 1 D. DOBBS, *supra*, § 3.11(1), at 455 & n.19. "'[C]ompensatory damages are usually admonitory as well as reparative.'" *Kalavity* v. *United States*, 584 F.2d 809, 811 n.2 (6th Cir. 1978) (quoting Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1182 (1931)). For example, the collateral source rule,[3] which applies to the award of compensatory damages, is designed (at least in part) to ensure that a tortfeasor is deterred from future misconduct. See, *e.g.*, *Wilson* v. *Burch Farms, Inc.*, 627 S.E.2d 249, 257 (N.C. App. 2006) (describing collateral source rule as "punitive in nature"); *Leitinger* v. *DBart, Inc.*, 736 N.W.2d 1, 21-22 (Wis. 2007) (Roggensack, J., dissenting) (noting that collateral source rule permits double recovery on part of plaintiff). Indeed, the prevalence of compensatory damages awards that far exceed the

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[3] The collateral source rule provides that amounts obtained from a third party cannot be used to offset the compensatory damages paid by a tortfeasor. *Helfend* v. *S. Cal. Rapid Transit Dist.*, 465 P.2d 61, 65-67 (Cal. 1970).

losses or injuries suffered by plaintiffs have led many knowledgeable commentators to express concern that compensatory damages awards – just like punitive damages awards – have become excessive. See DeCamp, *supra*, 27 HARV. J.L. & PUB. POL'Y at 234 ("[J]uries have increasingly awarded – and courts have upheld – unusually large awards of noneconomic compensatory damages."); Martin, "Litigation Abuse Running Amok in Wisconsin," HEARTLAND PERSPECTIVES (Jan. 9, 2006) available at http://www.heartland.org/Article.cfm?artID=18429.

The high incidence of multimillion-dollar compensatory damages awards in this country has also given rise to the valid concern that juries use compensatory damages to fulfill punitive goals. "[I]t is generally recognized * * * that juries give vent to their desire to punish the wrongdoer under the guise of increasing the compensatory damages * * *." *Wangen* v. *Ford Motor Co.*, 294 N.W.2d 437, 447 (Wis. 1980). According to one recent study, jurors who do not have the option to award punitive damages nonetheless punish the defendant by inflating compensatory damages. See Anderson & MacCoun, *Goal Conflict in Juror Assessments of Compensatory and Punitive Damages*, 23 LAW AND HUMAN BEHAVIOR 313, 321 (1999). Similarly, other studies have shown that jurors increase their estimates of injury when the wrongdoer acted intentionally as opposed to negligently. Anderson & MacCoun, *supra*, at 316 (citing Darley & Huff, *Heightened Damage Assessment as a Result of the Intentionality of the Damage-Causing Act*, 29 BRIT. J. OF SOC. PSYCHOLOGY 181, 181-88 (1990)). Simply put, there is a very real risk that jurors will base compensatory damages – which are intended to be plaintiff-focused – on defendant-driven concerns such as the defendant's wealth or degree of culpability.

This case is illustrative. The trial court instructed the jury that it could award damages only for an amount of money that "fairly compensate[d]" Eagle Research for "reasonable" and "ascertainable" losses that were caused by Daniel Measurement's alleged breach of a confidentiality agreement.

Pet. App. 44a. Although Eagle Research had offered no evidence demonstrating that it had incurred any loss whatsoever, the jury nonetheless returned a verdict with an eight-figure damages award.

The jury's "compensatory" damages award appears to be based on the evidence Eagle Research presented concerning Daniel Measurement's profits on the sale of two devices. At trial, Eagle Research introduced two documents purporting to estimate petitioner's profits. One set the profits at approximately $5.9 million (Pet. App. 50a); the other, at approximately $14.3 million (*id.* at 51a). Notably, the $10.5 million jury award approximates the average of these two figures. Eagle Research's counsel relied on these documents to defend the jury's verdict (*id.* at 53a-56a), and suggested that the jury's award was a compromise between these two profit figures (*id.* at 8a). But an award of Daniel Measurement's profits is not consistent with the trial court's clear instruction that damages should consist only of Eagle Research's "ascertainable losses." Indeed, the trial court rejected an instruction that would have permitted the jury to award Daniel Measurement's profits on the breach-of-confidentiality claim. *Id.* at 42a, 43a-45a.

An award of a defendant's profits, such as the one in this case, is more consistent with an award of punitive damages than compensatory damages. Allowing a plaintiff to recover profits earned by a defendant does not compensate the plaintiff for its own losses. It instead deters the defendant from future wrongdoing by removing the reward for his past wrongful conduct, and thereby the incentive to engage in such conduct in the future. "[O]ne ground for seeking deterrence-measured [punitive] awards is that there are a number of cases in which, in the absence of such liability, the defendant would find it profitable to continue its misconduct because the profits are high and compensatory damages are low." 1 D. DOBBS, *supra*, § 3.11(3), at 477. But "deterrence has long been recognized as one of the reasons for *punitive* awards * * *." *Id.* § 311(3), at 476 (emphasis added). As deterrence is a goal of punitive damages, but not compensatory damages (see *Cooper Indus.*,

532 U.S. at 432), the jury's award here was, in effect, quite similar to an award of punitive damages. See also Bozyk, *Disgorging American Business: An Examination of Overbroad Remedies in Civil RICO Cases*, 59 RUTGERS L. REV. 129, 140 (2006) ("Disgorgement is inherently a punitive remedy since the remedy goes beyond deterring tortious behavior and compensating injured parties.").

Because juries' "compensatory" damages awards are often at least partially punitive in nature (as is the case here), it naturally follows that such awards must be subject to the same procedural due process standards as punitive awards. The oft-repeated concern about the arbitrariness and excessiveness of punitive damages rings true in this case: "'[T]he impact of these windfall recoveries is unpredictable and potentially substantial.'" *Haslip*, 499 U.S. at 54 (O'Connor, J., dissenting) (quoting *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 87 (1998) (O'Connor, J., concurring in part and concurring in judgment)). Here, just as in *Oberg*, where this Court held that Oregon's law governing the award of punitive damages violated procedural due process, the "problem * * * is the possibility that a jury will not follow [the trial court's] instructions and may return a lawless, biased, or arbitrary verdict." 512 U.S. at 433. See also *id.* at 429 ("What we are concerned with is the possibility that a culpable defendant may be unjustly punished."). For all of these reasons, it makes perfect sense to apply the same procedural safeguards to compensatory awards as to punitive awards. Common sense thus points to the same conclusion as historical practice, tradition, and this Court's decisions.

II. The Procedures By Which Damages Were Awarded In This Case Violate The Fourteenth Amendment

The jury's award of damages in this case was not subject to the "definite and meaningful" constraint this Court's precedents require. See *Haslip*, 499 U.S. at 22. The jury violated the judge's instructions and awarded over $10 million in "compensatory" damages even though there was no evidence in

the record to support a finding that respondent had suffered *any* losses (let alone $10 million of losses) as a result of petitioner's breach of a confidentiality agreement.

The trial court's instructions to the jury made clear that the only appropriate measure of damages were losses that were proximately caused by petitioner's conduct. Pet. App. 44a. Although there was no evidence in the record to support a finding of *any* such loss, the jury nonetheless awarded $10.5 million, a figure that presumably represented a disgorgement of profits. The West Virginia trial court, however, did not instruct the jury that damages could be awarded on this basis, and the jury's award accordingly flatly violated the court's instructions.

During the argument on post-trial motions, the trial court appeared to agree with petitioner and informed the parties that it was "concerned" about the size of the jury award. Pet. App. 12a. But rather than take corrective action consistent with its doubts about the verdict, the court suggested that it was simply too much trouble to evaluate petitioner's objection to being compelled arbitrarily to pay more than $10 million on the basis of the jury's caprice: "I can't wade through the proceedings or the jury instructions at this stage, so I'm going to leave that as it is." *Id.* at 13a. The trial court clearly abdicated its duty to provide a meaningful review of the jury's verdict.

Even worse, petitioner was not entitled to appellate review of the trial court's decision. In West Virginia, appeals are discretionary, and a petition for appeal can be granted only by a majority of the 5 Members of the Supreme Court of Appeals. See W. VA. R. APP. P. 7. Accordingly, even though two Justices voted to hear petitioner's appeal (Pet. App. 28a), there was no review of the trial court's unexplained decision to deny the post-trial motions. Notably, only two other states – New Hampshire and Virginia – do not provide for any appeal as of right in civil cases. See U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, *State Court Organization 2004*, at 133-35 tbl. 22 (2006) ("*State Court Organization*") available at http://www.ojp.usdoj.gov/bjs/pub/pdf/sco04.pdf. Unlike West

Virginia, however, in both of those states, only *one* judge must vote to grant review in order to hear an appeal. See *id.* at 140-42 tbl. 24. West Virginia is therefore the only state in the Union in which petitioner would not have been entitled to an appeal under these circumstances.[4]

The "abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that" the resulting "procedures violate the Due Process Clause." *Oberg*, 512 U.S. at 430. By not affording petitioner the right to appellate review of the jury's verdict, and by not requiring any reviewing court to set forth its rationale for sustaining the verdict, West Virginia's procedures as implemented in this case deviate from the common law. What is more, they provide far less protection than any set of procedures previously sustained by this Court as consistent with due process.

A. Appellate review of jury damages awards – and of trial judges' decisions to sustain those awards – dates back at least to thirteenth century English Courts. "Not only did the court of original jurisdiction have power to order a conditional remittitur, and were under a duty to amend an excessive verdict, but if they failed to do this, or could not decide it * * * it was referred to a higher tribunal." *Sunray Oil Corp.* v. *Allbritton*, 187 F.2d 475, 479 (5th Cir. 1951) (Holmes, J., dissenting) (internal quotation marks omitted). This practice was well established by the time William Blackstone published his

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[4] Respondent may argue that, because West Virginia has only one court with appellate jurisdiction, mandatory jurisdiction over all civil appeals would impose too great a burden on the state's judicial system. But thirteen states have only one appellate court with jurisdiction over civil cases. In ten of those states, the appellate court has mandatory jurisdiction over *all* civil appeals. See *State Court Organization*, at 133-35 tbl. 22. And in the other two states in which appellate jurisdiction is discretionary, as discussed above, it takes the vote of only one judge of the court for an appeal to be heard.

Commentaries in 1768. As Blackstone described it, the King's Bench was

> a court of appeal, into which may be removed by writ of error *all* determinations of the court of common pleas, and of *all* inferior courts of record in England. * * * Yet even this so high and honourable court is not the *dernier resort* of the subject; for if he be not satisfied with any determination here, he may remove it by writ of error into the house of lords, or the court of exchequer chamber * * *.

3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND at 43 (1978) (*Of Private Wrongs*) (emphasis added); see also *Sunray Oil*, 187 F.2d at 480 n.6 (Holmes, J., dissenting).[5] There were several grounds for objections to jury verdicts, including "that the jury have brought in a verdict without or contrary to the evidence" and that the jury "have given exorbitant damages." 3 W. BLACKSTONE, *supra*, at 387. The right of appeal was necessary, as Blackstone explained:

> If every verdict was final in the first instance, it would tend to destroy this valuable method of trial * * *. Next to doing right, the great object in the administration of public should be to give public satisfaction. If the verdict be liable to many objections and doubts in the opinion of his counsel, or even in the opinion of by-standers, no party would go away satisfied unless he had a prospect of reviewing it.

Id. at 390.

This Court's opinions, regardless of whether they invalidated or sustained a state's procedures for awarding punitive damages, have emphasized the fundamental importance of appellate review. In *Haslip*, the Court emphasized the

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[5] To be sure, a right of appeal did not *always* exist in English courts. Prior to the establishment of a bill of attaint (the predecessor to the writ of error), objections to a jury verdict were resolved by "trial by battle." 3 W. BLACKSTONE, *supra*, at 389. Such was the Norman way.

importance of the Alabama Supreme Court's review of damages awards, stating that it "provides an additional check on the jury's or trial court's discretion." 499 U.S. at 20-21. And in *TXO*, the Court relied on the "unanimous" opinion of the West Virginia Supreme Court of Appeals that "gave careful attention to the relevant precedents" (509 U.S. at 465) to sustain the procedures used in that case. Thus, in *Oberg*, in which the Court held that the Due Process Clause requires judicial review of the amount of punitive damages awards, the Court noted that its prior decisions "stressed" the availability of both review by the trial court *and* subsequent appellate review. 512 U.S. at 420-21. The unavailability of appellate review of the jury's verdict, which is inconsistent with both the common law and this Court's decisions, resulted in procedures that fell short of the minimum requirements of the Due Process Clause.

B. Equally problematic as the lack of appellate review is that, in this case, no court ever articulated its reasons for sustaining the jury's verdict. As Blackstone explained, a meaningful and reasoned disposition of a motion for a new trial was essential at common law:

> Counsel are heard on both sides to impeach or establish the verdict, and the court give their reasons at large why a new examination ought or ought not to be allowed. The true import of the evidence is duly weighed, false colours are taken off, and all points of law which arose at the trial are upon full deliberation clearly explained and settled.

3 W. BLACKSTONE, *supra*, at 391. Indeed, in both *Haslip* and *TXO*, this Court discussed the importance of a well-reasoned and articulated opinion sustaining the jury's verdict. In *Haslip*, the court noted that Alabama "trial courts are 'to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of damages.'" 499 U.S. at 20 (quoting *Hammond* v. *City of Gadsen*, 493 So.2d 1374, 1379 (Ala. 1986)). And in *TXO*, the Court reasoned that the West Virginia Supreme Court of Appeals' "thorough opinion"

served to ensure that the requirements of the Due Process Clause were satisfied. 509 U.S. at 465.

C. The complete lack of meaningful post-verdict review distinguishes this case from both of the cases in which this Court has sustained an award of punitive damages against a procedural due process challenge.

In *Haslip*, the Alabama Supreme Court had established procedures for a trial court's review of a jury's punitive damages verdict. Those procedures both directed the trial court to evaluate the damages award using specific factors, and required the trial court to articulate its reason for sustaining or setting aside the jury's verdict. 499 U.S. at 20. This procedure, the Court explained, "ensures meaningful and adequate review by a trial court whenever a jury has fixed punitive damages." *Ibid.* And, after the trial court's evaluation of the propriety of the verdict, the Alabama Supreme Court "provides an additional check" on the trial court proceedings. *Id.* at 20-21. The appellate court's review also entailed specific, articulated steps. Thus, it undertook a comparative analysis of punitive damages awards, and then "applic[d] the detailed, substantive standards it has developed for evaluating punitive damages awards." *Id.* at 21. "The application of these standards," this Court concluded, "imposes a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages." *Id.* at 22.

The defendant in *TXO*, although that case also originated in West Virginia, also benefitted from procedures that were not present here and that imposed a "definite and meaningful constraint" on the jury's discretion. 509 U.S. at 497. During the hearing on TXO's post-verdict motions, the trial court described the defendant's conduct as "egregious" (*id.* at 451 n.12), a finding consistent with the jury's award of punitive damages. Moreover, the West Virginia Supreme Court of Appeals accepted review of the case, and issued a "thorough" opinion that "gave careful attention" to the relevant state and federal precedents. *Id.* at 465.

In stark contrast to these precedents, the trial court here articulated no reasons supporting its decision to sustain the jury's unsupported damages award. To the contrary, the only comment the trial court made with regard to the jury's $10.5 million verdict was that it was "concerned" about the amount. And there was no appellate review of the trial court's decision, despite the fact that two Justices (one vote short of a majority) believed the West Virginia Supreme Court of Appeals should hear petitioner's appeal. Accordingly, there was no articulation by *any* court of the rationale for sustaining the jury's verdict.[6]

Indeed, because of this Court's jurisprudence, West Virginia has set forth far stricter standards for the award and review of punitive damages than for compensatory damages. In *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991), the West Virginia Supreme Court of Appeals announced that: "Following the dictates of *Haslip*, we here set out a new system for the review of punitive damages awards in West Virginia." *Id.* at 908. The Court set forth five specific factors that the trial judge must "carefully explain" to the jury. *Id.* at 909. It also described specific issues the trial court must consider in reviewing a jury's award of punitive damages. *Ibid.* With regard to the "compensatory" damages award in this case, on the other hand, the trial judge gave only a terse (albeit correct) instruction to the jury (Pet. App. 44a) and there were no standards governing the trial court's review. The Due Process Clause requires more: it requires some procedures that serve as

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[6] The lack of adequate procedures for review of jury verdicts has real consequences. West Virginia recently was ranked the 49th worst legal system in the United States, and as a consequence many businesses do not want to conduct operations there. See REP. TODD TIAHRT, ECONOMIC COMPETITIVENESS CAUCUS, *Ending Lawsuit Abuse Is Vital for U.S. Competitiveness in a Global Economy*, available at http://www.house.gov/tiahrt/competitiveness/ec2_lawsuit.htm; AMERICAN TORT REFORM FOUND., *Judicial Hellholes 2006*, at 11 (2006), available at http://www.atra.org/reports/hellholes/report.pdf (ranking West Virginia as "Hellhole # 1" and stating that "there seems to be no reasonable limit on damages in the Mountain State * * *").

a "definite and meaningful constraint" on the jury's award of damages. Anything short of this "depriv[es] citizens of * * * property, through the application, not of law and legal processes, but of arbitrary coercion." *Gore*, 517 U.S. at 587 (Breyer, J., concurring).

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2007

APPENDIX

PRODUCT LIABILITY ADVISORY COUNCIL, INC.
LIST OF CORPORATE MEMBERS

3M
A.O. Smith Corporation
Altec Industries
Altria Corporate Services, Inc.
American Suzuki Motor Corporation
Andersen Corporation
Anheuser-Busch Companies
Appleton Papers, Inc.
Arai Helmet, Ltd.
Astec Industries
BASF Corporation
Bayer Corporation
Bell Sports
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Briggs & Stratton Corporation
Brown-Forman Corporation
CARQUEST Corporation
Caterpillar Inc.
Chevron Corporation
Chrysler LLC
Continental Tire North America, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation
The Dow Chemical Company
E & J Gallo Winery

E.I. DuPont De Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
Freightliner LLC
Genentech, Inc.
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
The Heil Company
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
International Truck and Engine Corp.
Isuzu Motors America, Inc.
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Komatsu America Corp.
Kraft Foods North America, Inc.
Lincoln Electric Company
Lyondell Petrochemical Company
Magna International Inc.
Mazda (North America), Inc.
Medtronic, Inc.

Merck & Co., Inc.
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Nokia Inc.
Novartis Consumer Health, Inc.
Novartis Pharmaceuticals Corporation
Occidental Petroleum Corporation
PACCAR Inc.
Panasonic
Pfizer Inc.
Porsche Cars North America, Inc.
PPG Industries, Inc.
Purdue Pharma L.P.
Putsch GmbH & Co. KG
The Raymond Corporation
Raytheon Aircraft Company
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Sanofi-Aventis
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Sturm, Ruger & Company, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Terex Corporation
Textron, Inc.
TK Holdings Inc.

The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Automotive
UST (U.S. Tobacco)
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.

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